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No. 03-5165

In The Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Whether *New York v. Belton*, 453 U.S. 454 (1981), which established a bright-line rule authorizing a search of a car's passenger compartment incident to the contemporaneous lawful arrest of an occupant therein, also authorizes a warrantless search of a car when the arrestee was not in the car when the police initiated contact with him or within reaching distance of the car at the time of his arrest?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Joint Appendix at pages 61-75, and is reported at 325 F.3d 189 (4th Cir. 2003). The rulings of the district court appear in the Joint Appendix at pages 30-37 and 59-60, and are unpublished.

JURISDICTION

The United States District Court for the Eastern District of Virginia had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. That court decided this case on April 3, 2003. J.A. 61, 76. Mr. Thornton filed his petition for writ of certiorari on July 1, 2003, which this Court granted on November 3, 2003. J.A. 77. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Material Facts

Late one morning in July 2001, Officer Deion L. Nichols was driving on Sewells Point Road, in Norfolk, Virginia, in an unmarked police car. While stopped at a traffic light, the officer noticed a driver in a gold-colored car who would not pull up next to his car. Finding this behavior suspicious, the officer pulled into a side street and turned around so that he could get behind the driver. J.A. 8-10, 12-13, 18, 30-31, 40.

After Nichols had turned around, he observed Petitioner Marcus Thornton's car – a gold Lincoln Town Car – drive past on Sewells Point Road. Mr. Thornton's car was not the car Nichols initially observed, and the officer noticed nothing unusual or suspicious about it. Nevertheless, Officer Nichols began to follow Mr. Thornton and "ran the tag anyway." He learned that the license plates were issued for a 1982 Chevrolet that was registered to Mr. Thornton.[1] Nichols continued to follow Mr. Thornton, but never signaled him to stop. J.A. 9-10, 13-14, 16, 30-31, 41, 46.

[1] Although Officer Nichols could not recall at the suppression hearing if he learned that the Chevrolet was registered to Mr. Thornton, the officer acknowledged the car's ownership at trial. J.A. 16-17, 41.

Mr. Thornton turned into the parking lot of a shopping center. He parked, got out of his car, and began to walk toward the stores. In the parking lot, he was intercepted by Officer Nichols, who had also parked and exited his unmarked car. J.A. 9-10, 16, 18, 31, 42, 46-47.

Officer Nichols asked Mr. Thornton to identify himself, and he did so. In response to Nichols' statement that the license plates were registered to another car, Mr. Thornton explained that he had recently acquired the Lincoln. J.A. 10-11, 16, 18, 42, 47. Nichols asked no follow-up questions about the license plates, J.A. 17-18, although under Virginia law, a person may, in specified circumstances, place plates registered to his car temporarily on another.[2]

Instead, Officer Nichols asked Mr. Thornton, who was sweating in the heat of the July day, why he was so nervous. Mr. Thornton replied "for no reason." Nichols then asked whether Mr. Thornton had any narcotics or weapons on him. Mr. Thornton said that he did not. J.A. 11, 18-19, 31, 42, 48.

Officer Nichols then decided he should frisk Mr. Thornton, and received Mr. Thornton's consent to do so. During the pat-down, Nichols felt a bulge of squishy material in Mr. Thornton's left front pants pocket that he could not identify. Nichols could not tell what the bulge was, so he again asked Mr. Thornton if he had any narcotics on him. Mr. Thornton owned up to having a bag of marijuana. Nichols directed

[2] *See Lawrence v. Commonwealth*, 578 S.E.2d 54, 56-57 (Va. Ct. App. 2003) (referencing applicable Virginia Code sections). At the suppression hearing, Officer Nichols could not recall whether he issued Mr. Thornton a summons for the irregularity of the license plates, but later testified at trial that he did not issue a summons. J.A. 17-18, 51.

him to hand it over. Mr. Thornton gave the officer two bags, one containing marijuana, the other containing a substance that appeared to be cocaine base. J.A. 11, 19-21, 31-32, 42, 48.

Nichols arrested Mr. Thornton, handcuffed him, and placed him in the back of the police car. Nichols then walked over to Mr. Thornton's car and searched it. The search, which Nichols described as "incident to that arrest," uncovered a nine-millimeter handgun. J.A. 11, 32, 42. Mr. Thornton was charged in the United States District Court for the Eastern District of Virginia with possession with intent to distribute cocaine base (21 U.S.C. § 841(a)(1)), possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)), and possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)). J.A. 63-64.

B. Proceedings Below

Before trial, Mr. Thornton moved to suppress, *inter alia*, the gun found as a result of the search of his car. J.A. 1-2, 30. With respect to that search, the United States argued only that it was justified as a search incident to Mr. Thornton's arrest and, alternatively, that the gun would have been inevitably discovered during an inventory search of the car. J.A. 22-23; *see also* J.A. 35-36. At the evidentiary hearing, the officer testified to the facts described above. He did not, however, testify to Mr. Thornton's distance from his car when arrested or whether that distance fell within "reaching distance" of the car.

The district court denied Mr. Thornton's motion in its totality, ruling in pertinent part that the officer conducted a valid search of the car previously driven by Mr. Thornton

incident to his arrest, despite the fact that it was clear that Mr. Thornton was not an occupant of the car at the time of that arrest. The court's written ruling on this point, in its entirety, was as follows:

> "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). After the Defendant voluntarily handed the narcotics to the police officer, probable cause existed and Nichols' arrest of Thornton was lawful. After the lawful arrest took place, a search of the automobile incident to that arrest was not a violation of Thornton's constitutional rights.

J.A. 35; *see also* J.A. 27-28. Although the district court described in its written opinion the facts leading up to the search of the car, J.A. 30-32, it made no specific findings regarding Mr. Thornton's distance from the car when Officer Nichols arrested him.[3]

At trial, Officer Nichols testified to essentially the same facts. J.A. 39-58. Again, that testimony did not establish Mr. Thornton's distance from his car at the time of arrest, and, more particularly, whether he was within "reaching distance" of it. Following the verdict of guilt on all three counts, Mr. Thornton moved for a new trial based upon the introduction of an illegally-seized firearm into

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[3] The district court also agreed with the United States that the gun would have been discovered during an inventory search following impoundment. J.A. 35-36. Although raised on appeal, the Court of Appeals specifically declined to reach that issue. J.A. 75.

evidence at trial. J.A. 3-4, 59. He argued in part that the search of his car was not permissible incident to his arrest because *New York v. Belton*, 453 U.S. 454 (1981), upon which the district court relied in denying the motion to suppress, did not authorize the car search as Mr. Thornton was not an occupant of the car at the time that Officer Nichols stopped him. J.A. 59; *see also* J.A. 23.

The district court denied the motion for a new trial, agreeing with the previous findings of United States District Judge Henry Coke Morgan that the search was proper. J.A. 59-60, 64. The court subsequently sentenced Mr. Thornton to 180 months of imprisonment and eight years of supervised release. J.A. 4, 64.

Mr. Thornton appealed to the United States Court of Appeals for the Fourth Circuit, challenging only the district court's refusal to suppress the firearm. J.A. 64. In a published opinion, that court affirmed the district court. *United States v. Thornton*, 325 F.3d 189 (4th Cir.), *cert. granted*, 124 S. Ct. 463 (2003); J.A. 61-75. The Court of Appeals determined that Officer Nichols' search of Mr. Thornton's car was proper even though Mr. Thornton was not in his car when Nichols first approached him. 325 F.3d at 196, J.A. 73-75. After reviewing this Court's rulings in *Chimel v. California*, 395 U.S. 752 (1969), and in *Belton*, the Court of Appeals acknowledged the division among the federal and state courts as to whether *Belton* applies in cases in which a defendant is not an occupant of a car at the time that a police officer first approaches him. 325 F.3d at 192-93, 194, J.A. 65-68, 68-70. For several reasons, the court determined that *Belton* authorized a search of a car incident to arrest even when the arrestee has not been approached by the police while still an occupant of the car. 325 F.3d at 194-96, J.A. 70-74.

First, the court found that this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983), supports the application of *Belton* in the situation where a defendant is already out of his car when the police first approach him. 325 F.3d at 194-95, J.A. 71. Second, the court maintained that the historical rationales behind the search incident to arrest exception permit a search regardless of a person's motivation for leaving his car. 325 F.3d at 195, J.A. 72. Finally, the court explained that a limitation on *Belton* to "occupants" of a car would create significant safety concerns for police officers because it would require them to confront an arrestee while that person is still in the car in order to take advantage of *Belton*'s exception to the warrant requirement. 325 F.3d at 195-96, J.A. 72-73. The court further suggested that any limitation on *Belton* could encourage occupants of cars to move away from their vehicles in order to avoid lawful searches. 325 F.3d at 196, J.A. 73.

Consequently, the court concluded that the spatial and temporal proximity test used by other courts was sufficient to protect arrestees from limitless applications of *Belton*. 325 F.3d at 196, J.A. 73-74. The court acknowledged that the record did not establish Mr. Thornton's precise distance from his car. 325 F.3d at 196, J.A. 74. Finding, however, that Officer Nichols had approached Mr. Thornton "*within moments*" of when he got out of his car, the Court of Appeals affirmed the district court's ruling that the search of Mr. Thornton's car was conducted incident to his arrest. 325 F.3d at 196, J.A. 74-75 (emphasis in original).

Mr. Thornton timely filed a petition for writ of certiorari. This Court granted the petition. 124 S. Ct. 463, J.A. 77.

SUMMARY OF ARGUMENT

In *Chimel v. California*, 395 U.S. 752 (1969), this Court authorized a warrantless search of the area within an arrestee's immediate control contemporaneously with his arrest. The Court justified such a search on the twin rationales that a police officer must be able to prevent an arrestee (1) from gaining access to weapons that could be used against the officer, and (2) from concealing or destroying evidence. Because an exception to the Fourth Amendment's warrant requirement must be closely tied to the rationales supporting the exception, the Court limited the area of the search to only the area within which an arrestee could reach for a weapon or evidence (hereafter "reaching distance"). In *New York v. Belton*, 453 U.S. 454 (1981), this Court established a bright-line rule as to what parts of a car an officer may search incident to arresting an occupant. The Court emphasized, though, that it was not retreating from the principles it laid out in *Chimel*; that is, the police may search only the area within reaching distance of the arrestee at the time of arrest. Although *Belton* clearly applies to an "occupant" of a car, the decision makes an isolated reference to a "recent occupant." This reference has caused courts to struggle with when *Belton* authorizes an automatic search of a car incident to an arrest that occurs outside the car.

The Court of Appeals acknowledged that the record in Mr. Thornton's case does not establish precisely how far he was from his car when he was arrested. The court also acknowledged that *Belton* is not without limits. Nevertheless, based on *Belton*'s single reference to recent occupants, the Court of Appeals expanded *Belton* to a situation in which a person is not an occupant of a car, but is merely proximately linked to the car, both in terms of time and

distance, although not necessarily within reaching distance of it (hereafter the "proximity approach"). This approach is wrong for several reasons.

First, the proximity approach is not consistent with the reasoning of *Chimel* and *Belton*. By permitting a search of a car when an arrestee is no longer an occupant or within reaching distance of it, the proximity approach becomes untethered from the two exigency rationales justifying the search incident to arrest exception. Nor does this Court's dicta in footnotes in *Michigan v. Long*, 463 U.S. 1032 (1983), authorize such an approach. Second, the proximity approach does not provide a straightforward, workable standard in its application. Courts have not reached any uniform consensus on the limits outside of which a person is no longer a recent occupant of a car. Third, the proximity approach does not further officer safety. If the person is beyond reaching distance of the car when he is arrested, then he is by definition deprived of the access to weapons that put officers in increased danger by virtue of the fact of arrest. In short, the proximity approach comes dangerously close to allowing automatic searches in all instances of custodial arrests made anywhere near a car, thus turning the Fourth Amendment's warrant requirement on its head. Consequently, this Court should reject the proximity approach as a means of determining who is a recent occupant of a car for purposes of applying *Belton*.

Instead of the proximity approach, the Court should adopt a means of determining who is a recent occupant that draws on *Chimel* and *Belton*. Under one alternative, advanced by Mr. Thornton below, *Belton* would apply only to a person who was an occupant of a car at the time the police initiated contact with him, as long as the officer

arrested that person within reaching distance of the car (hereafter the "contact initiation rule"). Although the Court of Appeals rejected the contact initiation rule, it is preferable to the proximity approach for several reasons. First, *Belton* and *Chimel* themselves support this rule, as in both cases it is clear that the police initiated contact with the defendants while they were, respectively, in the car or room to be searched. Second, the contact initiation rule is a simple and straightforward, non-subjective and fact-based rule that will be easy for police officers and courts alike to apply, i.e., was the person in the car at the time the police initiated contact, and did the officer arrest the person within reaching distance of the car? Third, the contact initiation rule does not adversely affect the safety of police officers. If the officer has not initiated contact while the person is in the car, then he can look to a number of other exceptions to the warrant requirement on which to justify his search, but not to *Belton*.

Another alternative for determining who is a recent occupant of a car is a limited version of the Court of Appeals' proximity approach (hereafter the "limited proximity approach"). Specifically, this approach would deem a recent occupant of a car to be a person who, prior to being arrested, has just gotten out of the car but is still within reaching distance of it at the time of arrest. Like the contact initiation rule, this approach finds support in *Belton* itself. The limited proximity approach also is consistent with *Long*, is straightforward and easy to apply, and furthers the two rationales underpinning the search incident to arrest exception.

Regardless of whether the Court chooses the contact initiation rule or the limited proximity approach, the United States has not carried its burden of proving that

the search incident to arrest exception justified the search of Mr. Thornton's car. The United States proved neither that Mr. Thornton was in his car when Officer Nichols approached him, nor that he was within reaching distance of the car when he was arrested.

In sum, *Belton* was never intended to extend *Chimel*, but instead was designed to establish how *Chimel* applies to cars. To extend *Belton*'s reach beyond reaching distance of a car untethers it from *Chimel* and from the rationales that justify what was intended to be a narrowly circumscribed exception to the warrant requirement of the Fourth Amendment.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY ALLOWING A *BELTON* SEARCH WHEN AN ARRESTEE IS MERELY IN PROXIMITY TO HIS CAR

When a police officer places a person under arrest, *Chimel v. California*, 395 U.S. 752 (1969), authorizes the officer to search that arrestee's person and the area within his immediate control contemporaneously with the arrest. *New York v. Belton*, 453 U.S. 454 (1981), applied *Chimel* to the arrests of occupants of cars, authorizing an automatic search of a car conducted contemporaneously with the lawful custodial arrest of an occupant of the car.

In upholding the search of Mr. Thornton's car, the Court of Appeals acknowledged that *Belton* "cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit

or how far he is from the vehicle when arrested." 325 F.3d at 196, J.A. 73. The court conceded that the record did not establish precisely how far Mr. Thornton was from his car when Officer Nichols confronted him. 325 F.3d at 196, J.A. 74. The court concluded, however, that the search of Mr. Thornton's car was valid because the officer approached Mr. Thornton "within moments" of when he left his car. 325 F.3d at 196, J.A. 74. The court found that the car was within Mr. Thornton's immediate control because he was "positively linked" to the car just before his arrest and he was in close temporal and spatial proximity to the car when he was arrested. 325 F.3d at 196, J.A. 74.

The Court of Appeals erred in ruling that *Belton* allows a search of a car when an arrestee is merely in proximity to his car (hereafter the "proximity approach"). As an initial matter, this approach is not consistent with this Court's prior decisions. It is not tethered to the exigent circumstances rationale that underpins the search incident to arrest exception, as required by *Chimel*, and by *Belton* itself. Further, the approach has yielded inconsistent results, and it sets no outer limit beyond which a person is no longer a recent occupant. Finally, the approach does not promote officer safety. In short, the proximity approach creates a rule of convenience for the police and eviscerates the protections provided by the Fourth Amendment.

A. The Proximity Approach Departs From This Court's Prior Decisions Regarding Searches Incident to Arrest

1. *Chimel v. California*

This Court set forth the foundation of its modern analysis of the search incident to arrest exception in *Chimel v. California*, 395 U.S. 752 (1969). In that case, Ted Chimel was suspected of burglarizing a coin shop. *Id.* at 753. Three police officers executed an arrest warrant by handing him the warrant when he came into his house after returning from work. *Id.* After Chimel refused to give consent for a search of his house, the officers proceeded – without a search warrant – to search "the entire three-bedroom house, including the attic, the garage, and a small workshop," as well as the contents of drawers, all purportedly incident to the arrest. *Id.* at 754. This Court held that the scope of the search was unreasonable under the Fourth Amendment. *Id.* at 768.

In so holding, the Court explained that the Fourth Amendment requires that "'[t]he scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)) (alterations in original). The Court then established two general principles that govern the acceptable scope of a search incident to arrest. First, the Court determined that it is "entirely reasonable" under the Fourth Amendment for police to search an arrestee's person in conjunction with a lawful arrest "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," and in order to prevent "concealment or destruction" of evidence. *Id.* at 763. Second, the Court found that "the area into which an arrestee might *reach* in order to

grab a weapon or evidentiary items must, of course, be governed by a like rule." *Id.* (emphasis added); *see also id.* at 766. Thus, *Chimel* defined the area that may be searched incident to arrest, referred to hereafter as "reaching distance."[4] The Court cautioned, however, that "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Id.* at 763. "Such searches, in the absence of well-recognized exceptions," the Court stated, "may be made only under the authority of a search warrant." *Id.*

In rejecting the argument that the search of Chimel's entire house, or even an entire room, was "reasonable," the Court noted that "that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Id.* at 764-65. "Under such an unconfined analysis," in the Court's view, "Fourth Amendment protection in this area would approach the evaporation point." *Id.* at 765. As the Court warned, "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary

[4] This area also has been called the "grab area," *see, e.g., United States v. Gwinn*, 219 F.3d 326, 335 (4th Cir.), *cert. denied*, 531 U.S. 1025 (2000); *United States v. Ortiz*, 146 F.3d 25, 28 (1st Cir.), *cert. denied*, 525 U.S. 917 (1998); the "grabbable area," *see, e.g., United States v. Lorenzo*, 867 F.2d 561, 561 (9th Cir. 1989); *State v. Gonzalez*, 487 N.W.2d 567, 569 (Neb. Ct. App. 1992); and "grabbing distance," *see, e.g., United States v. Sholola*, 124 F.3d 803, 817 (7th Cir. 1997).

items." *Id.* at 766 (footnote omitted). Thus, the Court concluded, "[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other." *Id.*

Only one Term after deciding *Chimel*, in a case analogous to this case, this Court considered whether a search of a house could fall within the search incident to arrest exception when the arrestee had just been in the house but was arrested outside of it. In *Vale v. Louisiana*, 399 U.S. 30 (1970), the Court concluded that neither *Chimel* nor earlier decisions authorized such a search. In *Vale*, three police officers who had warrants for Vale's arrest set up surveillance at his house. *Id.* at 31. After watching Vale come out of his house, approach an occupied car, return to his house, and come back out to the car, the officers concluded that a drug sale had occurred. *Id.* at 32. They drove toward Vale, who, when he saw them, turned around and walked back toward his house. *Id.* As he reached the steps of the house, two of the officers called to Vale, directing him to stop because he was under arrest. *Id.* The officers then searched the house. *Id.* at 33. In rejecting the application of the search incident to arrest exception to these facts, the Court "decline[d] to hold that an arrest on the street can provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestee's house." *Id.* at 35. The Court emphasized that "[i]f a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house," not "two blocks away," "twenty feet away," or even "on the sidewalk near the front steps." *Id.* at 33-34 (emphasis in original) (citations omitted).

2. *New York v. Belton*

In *New York v. Belton*, 453 U.S. 454 (1981), this Court addressed the proper scope of the search incident to arrest exception in the context of the "recurring factual situation" of car searches. *Id.* at 460. Specifically, the Court sought to answer the following question: "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?" *Id.* at 455.

In *Belton*, a single state trooper patrolling on the New York State Thruway pulled over a speeding car that contained four occupants. *Id.* The officer determined that none of the occupants owned the car or was related to the owner. *Id.* During the traffic stop, the officer smelled burnt marijuana and noticed an enveloped marked "Supergold" – which the officer associated with marijuana – on the floor of the car. *Id.* at 455-56. The officer ordered all four men out of the car and placed them under arrest for unlawful possession of marijuana. *Id.* at 456. He then patted down each occupant and "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other." *Id.* (internal quotation marks omitted). After finding marijuana in the "Supergold" envelope, the officer issued *Miranda* warnings and searched each occupant. *Id.* The officer then searched the passenger compartment of the car and found cocaine in the pocket of Belton's jacket, which was in the back seat. *Id.*

In concluding that the search of the car was lawful under the Fourth Amendment as a search incident to arrest, this Court began its analysis by observing that "[i]t

is a first principle of Fourth Amendment jurisprudence" that before the police may conduct a search, they must convince a neutral magistrate that they have probable cause to obtain a warrant for that search. *Id.* at 457. Absent a warrant or the application of an exception to the warrant requirement, the search is improper. *Id.* The Court noted that a search conducted incident to a lawful arrest is one of those exceptions because of the need to search the arrestee and "the immediately surrounding area" in order to locate any weapons and any evidence that could be concealed or destroyed. *Id.* While recognizing this exception, the Court reaffirmed the principle announced in *Terry v. Ohio*, 392 U.S. 1 (1968), and emphasized in *Chimel* that "'the scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Belton*, 453 U.S. at 457 (alteration in original) (quoting *Chimel*, 395 U.S. at 762 (quoting *Terry*, 392 U.S. at 19)). The *Belton* Court also noted that the *Chimel* Court had found "'no comparable justification . . . for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.'" *Belton*, 453 U.S. at 458 (quoting *Chimel*, 395 U.S. at 763).

While reaffirming the "reaching distance" test established in *Chimel*, the *Belton* Court noted that lower courts had found it difficult to apply in cases concerning "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants." *Belton*, 453 U.S. at 459 (citing lower court cases reaching conflicting results). In particular, the Court acknowledged that "courts have found no workable definition of 'the area within the immediate control of the arrestee' when that

area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460.

Stressing the importance of a clear standard to guide police and citizens in this "recurring factual situation," the Court observed that the cases addressing such situations "suggest[ed] the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* (second alteration in original) (quoting *Chimel*, 395 U.S. at 763). In order to establish a "workable rule" for this "category of cases," the Court "read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization," and held that "when a policeman has made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* (emphasis added) (footnote omitted). The Court further explained that police may also examine the contents of containers found within the passenger compartment, whether open or closed, because "if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* The car's trunk, however, may not be searched. *Id.* at 460 n.4.

In so holding, the Court clarified that it did "no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460 n.3. As such, the Court conveyed its belief that the search incident to arrest exception to the Fourth Amendment's warrant requirement, even

as applied to cars, remained limited in its application, specifically to areas within the reaching distance of an arrestee.

Ultimately, what *Belton* established was a rule to govern the permissible scope of searches of cars conducted incident to lawful arrests of occupants of those cars: police may search the passenger compartment in its entirety, including open and closed containers, but they may not search the trunk. This is a "bright-line" rule that dispenses with the need for fact-specific inquiries in individual cases as to whether particular areas of the passenger compartment or containers in it satisfy the *Chimel* "reaching distance" test.

Belton, then, by its own terms, addressed only the *scope* of a search once the search was authorized by virtue of the lawful custodial arrest of the occupant of a car made while the occupant was in the car or within reaching distance of it. What *Belton* did not do, however, was to explicitly define the term "occupant" for purposes of the application of its bright-line rule, even though the facts of the case implicitly define that term. The Court's repeated references to a car's "occupant," *see* 453 U.S. at 455, 459, 460, make clear that the police may search a car incident to a lawful arrest when the arrestee is still physically in the car when he is first observed by the police and then arrested either while he is inside the car, or outside the car so long as he remains within reaching distance of it. However, while the Court made a lone passing reference to a car's "recent occupant," *id.* at 460, it did not define that term, except inferentially by the facts of the case.

3. The Court of Appeals' Misreading of *Chimel* and *Belton*

The Court of Appeals affirmed the *Belton* search of Mr. Thornton's car, finding that he was in "close proximity" to it when Officer Nichols approached him. 325 F.3d at 196, J.A. 74-75. Thus, Mr. Thornton was "positively linked" to the car, "both temporally and spatially" prior to and at the time of his arrest. 325 F.3d at 196, J.A. 75. As such, the court defined "area of immediate control" in terms of linkage to the car to be searched and the arrestee's proximity to the car. As noted previously, however, *Chimel* and *Belton* require that the arrestee be within *reaching distance* of the area to be searched, not merely within "close proximity" or "positively linked" to it. Consequently, the proximity approach adopted by the Court of Appeals is at odds with this Court's decisions.

First, the proximity approach is wholly untethered from the exigency rationales that justify the search incident to arrest exception. *Chimel* and *Belton* grounded their holdings on the historic rationales underlying that exception – officer safety and prevention of the destruction of evidence. *See Belton*, 453 U.S. at 457. Yet the proximity approach has no nexus to those justifications because it focuses on distance and time as to someone not occupying a car, without any apparent consideration of how those factors bear upon whether the arrestee might obtain weapons or evidence from the car. Indeed, the approach effectively abandons the "area of immediate control" test that is the touchstone of *Chimel* and that was preserved by *Belton*, and instead expands the meaning of *Belton*'s "occupant" to include clear non-occupants who may or may not be within reaching distance of the car. Just as this Court presciently warned in *Chimel*, warrantless searches

would have no "point of rational limitation" – i.e., no tie to the exigent circumstances that justify the exception to the warrant requirement – once they are allowed to go beyond an arrestee's reaching distance. *Chimel*, 395 U.S. at 766.

This is not an abstract or theoretical concern. A review of even a few cases demonstrates that there is no logical stopping point to the scope of warrantless car searches once courts apply a test divorced from the reasons for the search incident to arrest exception. *See, e.g.*, *United States v. Arango*, 879 F.2d 1501, 1503, 1506 (7th Cir. 1989) (upholding car search as incident to arrest where suspect was arrested a block away from his car and was returned to his car under the direction and control of police; court reasoned that suspect was again "in proximity to the jeep" and that search was "nearly contemporaneous" to arrest), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Patterson*, 65 F.3d 68, 69-71 (7th Cir. 1995) (upholding car search as incident to arrest although officer never observed arrestee, who was working under the hood of his car, inside the car), *cert. denied*, 516 U.S. 1061 (1996); *Cason v. Commonwealth*, 530 S.E.2d 920, 922, 924 (Va. Ct. App. 2000) (upholding moped search as incident to arrest where police never saw suspect on moped, but suspect, who was carrying a motorcycle helmet, told police that the moped was in a yard approximately twenty-five to thirty feet away).

Second, the proximity approach is not compelled, nor even supported, by *Michigan v. Long*, 463 U.S. 1032 (1983), a case the Court of Appeals relied upon in determining that this Court "has clearly indicated, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile." 325 F.3d at 194,

J.A. 71. In *Long*, two police officers observed Long's car traveling erratically and speeding late at night. After watching the car go into a ditch, they stopped to investigate. Long met the officers at the rear of the car.[5] Suspecting that Long was intoxicated, the officers asked to see his license and car registration. As Long walked toward the open door of his car to retrieve his registration, followed by both officers, they observed a large hunting knife on the driver's side floorboard. After frisking Long, one officer stayed by him while the other officer conducted a search of the passenger compartment for other weapons. Inside the car he found marijuana. The officers arrested Long for possession of marijuana and impounded his car. 463 U.S. at 1035-36. This Court held that a protective search of the passenger compartment of Long's car was valid because the officers had an articulable suspicion that Long was dangerous and that the car contained weapons, and the officers were allowing Long to reenter it. *Id.* at 1035, 1052.

After noting that the officers observed Long driving "erratically and at excessive speeds," the Court commented in a footnote that "if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York v. Belton*." *Id.* at 1035 & n.1. Later in the opinion, in another footnote, the Court further commented, "the 'bright line' that we drew in *Belton* clearly authorizes . . . a

[5] It is unclear from the Court's description of the facts whether the officers were in active pursuit of Long's car or had initiated contact with it before it ran off the road. *See People v. Long*, 320 N.W.2d 866, 868 (Mich. 1982) (noting that the officers "turned their vehicle around and pursued the speeding vehicle"), *rev'd*, 463 U.S. 1032 (1983).

search whenever officers effect a custodial arrest." *Id.* at 1049 n.14. These dicta, though, suggest nothing more than that the officers would have been authorized to search the car had they arrested Long for speeding or driving while intoxicated as he remained within reaching distance of his car, the door of which was open.

Moreover, the Court's dicta must be considered in their larger context. As the Court acknowledged, the respondent conceded that the search incident to arrest exception applied. *Id.* at 1035 n.1. Thus, the Court did not need to have an extended discussion of *Belton*. Further, this Court decided *Long* only two years after *Belton* – before it had become apparent that courts were struggling with the meaning of "recent occupant." The Court could not possibly have intended by two offhand comments, made only in footnotes, to expand *Belton*, involving as it does an issue of such constitutional significance as the scope of an exception to the Fourth Amendment's warrant requirement. *See United States v. Robinson*, 414 U.S. 218, 229 (1973) (declining to "impose a novel and far-reaching limitation" on the search incident to arrest exception based on an "unexplained and unelaborated sentence" in an earlier Supreme Court opinion). Taken together, all of these factors severely undermine the Court of Appeals' reliance on *Long* to justify its expansion of the *Belton* rule.

B. The Proximity Approach Yields Inconsistent Results and Sets No Clear Outer Limit for Defining Recent Occupant, Thus Blurring the Bright Line *Belton* Meant to Establish

In addition to its radical departure from this Court's prior decisions and the exigency rationales supporting

them, the proximity approach also fails to provide a straightforward, workable standard in its application – a significant part of the *Belton* Court's rationale for establishing a per se rule. *Belton*, 453 U.S. at 458, 459, 460. Rather than solving line-drawing problems in this area, the approach instead merely shifts the line-drawing inquiry to questions of place and time. For example, is an occupant "recent" when he is ten feet from the car? Twenty? Fifty? Is an occupant "recent" when he has been out of the car for five minutes? Ten minutes? Thirty? What about two hours? Under the proximity approach, what linkage is sufficient? Must the arrestee possess keys to the car? Does it matter if the police even observe the arrestee inside the car? Because the proximity approach does not and cannot answer these questions, it will lead only to uncertain and inconsistent outcomes in this area.

In fact, the lower courts considering such questions have, not surprisingly, produced disparate results. For example, one court has upheld a search when the person was "clearly outside the grabbable area" (i.e., reaching distance) of the car. *State v. Gonzalez*, 487 N.W.2d 567, 571 (Neb. Ct. App. 1992). Other courts have upheld automatic searches of cars incident to arrest when the arrestee was at least twenty, if not thirty feet from the car, but under police surveillance. *See, e.g.*, *Glasco v. Commonwealth*, 513 S.E.2d 137, 138 (Va. 1999); *People v. Bosnak*, 633 N.E.2d 1322, 1323, 1326-27 (Ill. App. Ct. 1994); *State v. McClendon*, 490 So. 2d 1308, 1309-10 (Fla. Dist. Ct. App.), *rev. denied*, 500 So. 2d 544 (Fla. 1986). Another court upheld a search incident to arrest when the suspect was twenty-five to thirty feet from his vehicle (a moped) but the officer had not seen him on it. *Cason v. Commonwealth*, 530 S.E.2d 920, 922, 924 (Va. Ct. App. 2000).

In contrast to the foregoing cases, the United States Court of Appeals for the Fifth Circuit found a search of a defendant's car to be *invalid* where the police arrested him only six to ten feet from his car shortly after he had exited it. *United States v. Green*, 324 F.3d 375, 379 (5th Cir.), *cert. denied*, 124 S. Ct. 152 (2003). Another court found that a person was not a recent occupant of his truck when the police found him in a bar and the record did not reflect his proximity to his truck in the parking lot at the time he was arrested outside the bar, or how long he had been out of the truck. *Gauldin v. State*, 683 S.W.2d 411, 414 (Tex. Crim. App. 1984), *overruled on other grounds by State v. Guzman*, 959 S.W.2d 631 (Tex. Crim. App. 1998). Yet another court found that a person was not a recent occupant when he had been out of the car for over two hours and had walked three miles to his home, returning later to his car. *State v. Vanderhorst*, 419 So. 2d 762, 764 (Fla. Dist. Ct. App. 1982). Similarly, the Arizona Supreme Court has ruled that a person was not a recent occupant because he had been out of his car and in his house for more than two hours, even though he had fled his car to escape the police. *State v. Dean*, 76 P.3d 429, 437 (Ariz. 2003). This wide disparity of results makes plain that the proximity approach is anything but a "straightforward" or "workable" inquiry. *See Belton*, 453 U.S. 459, 460.

C. The Proximity Approach Does Not Further Officer Safety

In determining that *Belton* permits searches in cases such as Mr. Thornton's, the Court of Appeals maintained that limiting *Belton* would jeopardize officer safety because it would force officers to confront or signal confrontation of an arrestee while he is still in a car. 325 F.3d at 195,

J.A. 72. Specifically, the court noted that "when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle." *Id.* Consequently, the court determined that the police should still be able to search a car incident to arrest even where the arrestee was not in his car at the time the police approach him.

In the situation the Court of Appeals describes, however, the very basis of the search incident to arrest exception – preventing an arrestee's access to weapons and evidence in his car – is obviated when "officers . . . wait until the suspect has exited . . . , thereby depriving the suspect of any weapons he may have in his vehicle." It makes little sense to apply an exception designed to prevent access to weapons or evidence in a car when a suspect already has deprived himself of that very access by leaving the car. For the person who has left the car, what he has on his person, not what he leaves behind in the car, presents the real risk, and that risk is always present for an officer whenever he makes an arrest. But both the *Terry* frisk exception and the *Robinson* search incident to arrest exception provide the police with recourse to protect themselves. *See United States v. Robinson*, 414 U.S. 218 (1973); *Terry v. Ohio*, 392 U.S. 1 (1968). Indeed, Officer Nichols availed himself of that protection when he frisked Mr. Thornton prior to the arrest. J.A. 11, 19. Further, if the police have a reasonable suspicion even before they arrest a person standing near a car that he may be dangerous, the officers may protect themselves by searching the car pursuant to *Long*. *Long*, 463 U.S. at 1035.

In short, the proximity approach amounts to little more than a rule of convenience for police officers that enables them to conduct searches of cars in almost all situations involving the arrest of someone who can be linked to a car and is somewhere near it, even when those situations are entirely divorced from the exigency justifications upon which the *Belton* rule rests. Put another way, the proximity approach comes dangerously close to granting the police an automatic right to search cars in all instances of a custodial arrest near a car, even when they have no probable cause, or even reasonable suspicion, as to the car itself.

This approach thus turns Fourth Amendment law on its head. Rather than being per se unreasonable, warrantless searches of cars would be uniformly permissible when a former occupant is arrested, subject only to the "limitations" of attenuated distance and/or time and some sort of linkage. However, the distance and time factors are in many cases entirely within the control of the police. Even the linkage factor may be within an officer's control. *See United States v. Sholola*, 124 F.3d 803, 807 (7th Cir. 1997) (police officer asked suspect if he had a car). As a practical result, therefore, the proximity approach would permit warrantless car searches incident to the arrests of "recent" occupants in the vast majority of cases. Although such a result may suit the police, it flies in the face of the core Fourth Amendment principles that warrantless searches are "per se unreasonable," *Katz v. United States*, 389 U.S. 347, 357 (1967), and that exceptions to the warrant requirement must be "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958). There is nothing careful or precisely drawn about the proximity approach.

II. THIS COURT SHOULD REAFFIRM THE REASONABLE LIMITS ESSENTIAL TO *BELTON*'S BRIGHT-LINE RULE

Instead of the amorphous and manipulable approach that the Court of Appeals adopted, this Court should adopt a rule that is drawn from *Belton*'s facts and language and tied to its reasoning. *Belton* itself suggests two alternatives. One alternative, which was proposed by Mr. Thornton and rejected by the Court of Appeals, limits *Belton*'s application to cases in which a police officer initiates contact with an arrestee while he is in the car and arrests him either in the car or within reaching distance of it (the "contact initiation rule"). This rule fits with the facts of *Belton* and its references to "occupant" and "recent occupant." The other alternative, a limited version of the proximity approach, permits an officer to search a car only when the arrestee is still physically in the car when he is arrested, or having just exited the car, remains within reaching distance of it when arrested (the "limited proximity approach"). This alternative also fits the facts and language of *Belton*, and is closely linked to the two exigency rationales underpinning the search incident to arrest exception. Both alternatives are easier to apply than the proximity approach employed by the Court of Appeals, and both protect the safety of police officers. Further, regardless of which of these two alternatives the Court chooses to adopt, the United States has not proven that the search of Mr. Thornton's car was reasonable as it has not shown that Mr. Thornton was still within reaching distance of his car when he was arrested.

A. *Belton*'s Automatic Search Rule Should Be Restricted to Cases in Which the Police Initiate Contact With the Arrestee While He Is in the Car

Under the contact initiation rule, a police officer may conduct an automatic search of a car when the officer has initiated contact with the person while he is still in the car and the officer subsequently arrests the person while he is either still in the car or within reaching distance of it. Under this rule, the determination that the officer or a court reviewing his actions must make is purely factual. It focuses solely on the officer's actions, and only those actions. Did the officer indicate his presence to the subsequent arrestee while that person was in the car? Did the officer turn on his lights or siren? Did the officer use a loudspeaker to announce his presence or direct the car to pull over? Did the officer approach the car and shine a flashlight into it? Further, under the contact initiation rule, what the person in the car knew about the officer's presence is not relevant to the determination. Consequently, when or why the person may leave the car, including an exit prompted by a command from the officer, is irrelevant. That is, there is no subjective component of the contact initiation rule, either as to the officer's or the occupant's intent.[6]

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[6] The contact initiation rule has been criticized for requiring a determination of the subjective reasons why a person leaves a car in cases in which a person gets out of a car after the police initiate contact but before they physically reach him. *See* Petitioner's Brief on the Merits at 6, *Florida v. Thomas*, 532 U.S. 774 (2001) (No. 00-391) (dismissing for lack of jurisdiction); Petitioner's Brief on the Merits at 18, *Arizona v. Gant*, 124 S. Ct. 461 (2003) (mem.) (No. 02-1019)

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1. The Contact Initiation Rule Comports With This Court's Prior Decisions

The contact initiation rule is grounded in this Court's own decisions, particularly *Belton* itself. *Belton*'s facts and holding establish a per se rule that applies only when the police initiate contact with the arrestee while he is an occupant of a car. As described earlier, *see supra* Section I.A.2, Roger Belton and three others were occupants of a car when their car was stopped by a New York State police officer for speeding. 453 U.S. 454, 455 (1981). Based on the officer's smell of burnt marijuana and his observation of the "Supergold" envelope, he arrested the occupants. *Id.* Under these circumstances, where the police had initiated contact with the arrestees while they were still in their car, this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted).

(vacating judgment and remanding for further consideration). These critics, however, read in a component of the rule that does not exist. This "subjective" component appears to stem from the language in some decisions distinguishing between factual situations in which the police directed a person to exit a car and those in which the police did not direct the person to exit the car. *See, e.g.*, *United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir.), *cert. denied*, 516 U.S. 891 (1995); *Thomas v. State*, 761 So. 2d 1010, 1013-14 (Fla. 1999), *cert. dismissed*, 532 U.S. 774 (2001); *People v. Fernengel*, 549 N.W.2d 361, 362-63 (Mich. Ct. App.), *appeal denied*, 552 N.W.2d 170 (Mich. 1996), *and cert. denied*, 520 U.S. 1110 (1997). The fact that the cases use the word "voluntary" to indicate that the person exited the car on some basis other than at police direction, however, does not introduce a subjective component into the rule.

"[T]he *Belton* Court made very clear that the bright-line rule enunciated in that case extended only as far as its factual context." *Lewis v. United States*, 632 A.2d 383, 385-86 (D.C. 1993). "The Supreme Court's references in *Belton* to 'a search . . . after the arrestees are no longer in [the automobile]' and to 'recent occupant[s]' of an automobile clearly pertain to occupants who have been removed by the police, which is precisely what occurred in that case." *Id.* at 386 n.6 (citations omitted). Further, a custodial arrest of a car's occupant generally takes place only after that person has left the car. In fact, "it would be an unusual situation for a police officer not to remove a suspect from a car while going through the arrest process, both for reasons of safety and because of the practical physical limitations of effecting an arrest in such a confined area." *Daygee v. State*, 514 P.2d 1159, 1166 (Alaska 1973). It is apparent from *Belton* itself, therefore, that for purposes of applying the *Belton* rule, an occupant becomes a "recent occupant" at the time of arrest when he leaves the car after the police have initiated contact while he was in it.

The contact initiation rule also is consistent with analogous Fourth Amendment rules governing when an officer may search a house incident to arrest, including *Chimel*. In *Chimel*, the police initiated contact with the defendant only after he had come into his house and the officers handed him the arrest warrant issued against him. 395 U.S. 752, 753 (1969). Conversely, in *Vale v. Louisiana*, 399 U.S. 30, 33-34, 35 (1970), this Court held that the police could not search a defendant's house when they had arrested him outside of the house. It is clear from the facts of *Vale* that the police did not initiate contact with the defendant until he was outside of his house, much

less arrest him. *Id.* at 32-33. Similar to *Vale*, then, if the police have not initiated contact with a car's occupant while he is in the car, that person's decision to leave the car, whatever the reason, does not give rise to an automatic search of his car merely because he is near it.

2. The Contact Initiation Rule Is Easy to Understand and to Apply

In addition to being soundly based in this Court's decisions, the contact initiation rule is easily understood and can be routinely followed by both police officers and courts. An officer in the field or a trial judge evaluating the legality of a search can quickly determine whether or not the officer had initiated contact with the arrestee while that person was still in a car. Indeed, in most instances, arrests will be the product of traffic stops in which the officer signals the driver to pull over by activating his lights or siren or by using a loudspeaker. In other situations, an officer need only determine whether or not he has spoken to, or otherwise signaled to, someone inside a car. If the officer has done so, and if he then effectuates a lawful custodial arrest within reaching distance of the car, he may search the car contemporaneously with that arrest.

3. The Contact Initiation Rule Does Not Reduce Officer Safety

The Court of Appeals in this case rejected the contact initiation rule in part because of its concern that officers will have to "race" from their patrol cruisers to a car to prevent an occupant from exiting his car, thus exposing

themselves to danger. 325 F.3d at 196, J.A. 73. This concern is unfounded for two reasons.

First, as other courts have recognized, if a police officer initiates contact with a car's occupant, that occupant cannot "*Belton*-proof" the car by leaving it before the officer leaves his car, as long as the officer arrests the person within reaching distance of the car. *See Thomas v. State*, 761 So. 2d 1010, 1013-14 (Fla. 1999) (warning that *Belton* applies even if defendant leaves car when officer approaches), *cert. dismissed*, 532 U.S. 774 (2001); *accord State v. Harris*, 942 P.2d 568, 572 (Idaho Ct. App. 1997) (in case where officer pursued defendant with lights activated but defendant drove to his house, got out of car, and walked toward the house, stating that "[a] hasty exit from the automobile *after* an officer has initiated contact does not enable a suspect to avoid a search of the passenger compartment incident to arrest") (emphasis in original). Further, if the person leaves his car and moves beyond reaching distance of it before the officer gets to him, the officer would have no reason to fear that the person would or could reach into the car for a weapon or evidence. Therefore, the two rationales supporting the search incident to arrest exception would not be met in the first instance, and the exception should not be applied unless the person moves back to within reaching distance of the car.

Second, in those cases where an officer does not initiate contact until after the arrestee is out of the car, the officer will still have available other exceptions to the warrant requirement under which he may be able to justify a search. Only a few years ago, in *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court relied upon that very fact when it declined to expand the *Belton* rule to cases involving

the issuance of a citation rather than a full-blown arrest. The Court agreed that officer safety is certainly at issue in a routine traffic stop, but found that that concern "does not by itself justify the often considerably greater intrusion attending a full field-type search." *Id.* at 117. The Court then recognized that "[e]ven without the search authority Iowa urges, officers have other, independent bases to search for weapons and protect themselves from danger." *Id.*

For example, the officer can ask for consent to search the car. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). He can impound the car following the arrest and inventory its contents. *South Dakota v. Opperman*, 428 U.S. 364 (1976). If the officer has concern for his safety, he may be able to undertake a protective sweep of the car, as in *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The officer also can look to the automobile exception, *Carroll v. United States*, 267 U.S. 132, 149, 155-56 (1925), if he has probable cause to believe the car contains contraband, or to the forfeiture exception, *Florida v. White*, 526 U.S. 559, 561 (1999), if he has probable cause to believe the car is an instrument of a crime. These latter two exceptions become particularly relevant in the context of undercover surveillance of cars, as an officer who has been observing a car will probably have seen something that gives rise to probable cause. In short, the search incident to arrest exception is not an officer's only basis for searching a car: any one of these other exceptions to the warrant requirement may provide a justification – if, of course, the officer and government can establish its applicability. *See United States v. Jeffers*, 342 U.S. 48, 51 (1951) (noting that "the burden is on those seeking the exemption to show the need for it"); *McDonald v. United States*, 335 U.S. 451, 456

(1948) (stating that warrant requirement cannot be excused without "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative").

In summary, the contact initiation rule provides a simple, bright-line test for determining who is a recent occupant of a car in order to apply *Belton*. Restricting *Belton* to cases in which officers made their initial contact with a car's occupant avoids the case-by-case decisions that would otherwise be necessary for officers and judges to make. Moreover, if the police do not initiate contact with a person while he is in the car, the police still have other options that both promote officer safety and prevent the destruction of evidence and, at the same time, respect the protections afforded by the Fourth Amendment.

B. Alternatively, a Limited Proximity Approach Also Provides an Appropriate, Workable, and Reasonable Application of *Belton*

Should this Court reject the contact initiation rule in favor of the proximity approach, then the Court should modify that approach so that it limits "recent occupancy" of a car to the distance and time factors that mattered in *Belton* itself. Specifically, the Court should find that a person is a "recent occupant" of a car only when that person, having just exited the car, remains within reaching distance of it at the time of his arrest.

This limitation allows the proximity approach to comport with this Court's prior decisions. It clearly fits with the facts of *Belton*. It also squares with *Long*, as Long had just gotten out of his car and was arrested at the rear

of it. *See* 463 U.S. 1032, 1036 (1983). Additionally, like the contact initiation rule, the limited proximity approach is straightforward and easy for police officers and judges alike to understand and apply, as it would involve only two objective factual determinations: first, did the person just get out of his car, and second, was he still within reaching distance of the car when he was arrested? Most importantly, unlike the proximity approach adopted by the Court of Appeals, the requirement of the limited proximity approach that the person be arrested within reaching distance of the car dovetails with the two rationales underlying the search incident to arrest exception – protecting police officers and preventing the concealment or destruction of evidence. Thus, the limited proximity approach enables the search incident to arrest exception as applied to cars to remain just that: an exception to the Fourth Amendment's warrant requirement, not the rule.

C. Applying Either the Contact Initiation Rule or the Limited Proximity Approach, the United States Failed to Establish That the Search of Mr. Thornton's Car Was Reasonable Under the Fourth Amendment

Applying the contact initiation rule to Mr. Thornton's case, it is readily apparent that he was not an occupant or recent occupant of a car as is required for purposes of applying the *Belton* rule. Nothing in the record of this case indicates that Officer Nichols did anything to initiate contact with Mr. Thornton while he was in his car. The officer did not turn on his lights or siren, or in any way indicate his presence to Mr. Thornton until the latter had exited his car and begun to walk away from it. Under these circumstances, the United States cannot rely on the

search incident to arrest exception to justify the search of Mr. Thornton's car.

Similarly, the United States cannot sustain its burden under the limited proximity approach. The United States did not demonstrate below that Mr. Thornton was still within reaching distance of his car when Officer Nichols arrested him. Officer Nichols never testified as to what constitutes "reaching distance," or whether Mr. Thornton was within that distance vis-a-vis his car when the arrest occurred. Further, the district court made no factual findings on these points.

Indeed, the Court of Appeals specifically acknowledged that the record did not establish the actual distance between Mr. Thornton and his car. 325 F.3d at 196, J.A. 74. Instead, all that the court could conclude was that Officer Nichols approached Mr. Thornton "within moments" of when he left his car, and that Mr. Thornton was in "close proximity, both spatially and temporally," to his car when arrested. *Id.* "Within moments" and "close proximity," however, are much too vague to be sufficient for the United States to prove that Mr. Thornton was within *reaching distance* of his car when Officer Nichols arrested him. Consequently, the United States did not carry its burden of demonstrating the applicability to Mr. Thornton's case of the search incident to arrest exception to the warrant requirement. The search of his car was therefore unreasonable under the Fourth Amendment.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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